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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

APPELLANT: Kazich

ATTY. DOCKET NO.: VAK-P-03-001

SERIAL NO.: 10/800,225

GROUP ART UNIT: 1794

DATE FILED: March 12, 2004

EXAMINER: Weinstein

INVENTION: "AN APPARATUS, A SYSTEM AND A METHOD FOR COLLECTING
DRIPS FROM A FROZEN TREAT"

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

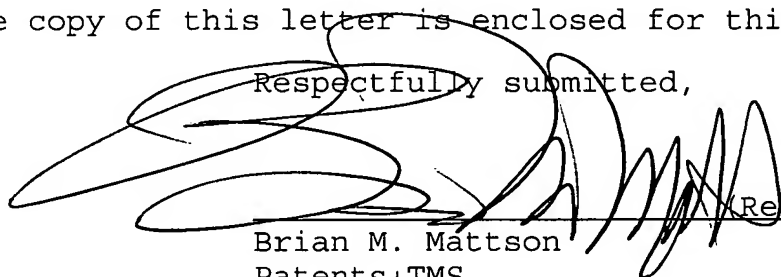
SIR/MADAM:

Appellant submits herewith Appellant's Appeal Brief in response to the Notification of Non-Compliant Appeal Brief dated June 12, 2008 and in support of the Notice of Appeal filed on December 26, 2007. This Appeal Brief has been amended to overcome the Examiner's reasons for non-compliance. Namely, the structure, material and/or acts described in the specification as corresponding to dependent Claims 2, 3, 17 and 18 have been set forth with reference to the specification by page and line number, and to any drawing by reference characters in the Summary of Claimed Subject Matter. Further, each of the claims argued separately, including, for example, Claims 1-3, 8, 13, 17 and 18 have been placed under separate subheadings in the Argument section of the Appeal Brief. The Appendices are not included with this Appeal Brief because MPEP §1205.03(A) indicates that an entire new brief need not, and should not, be filed when the Patent Office holds the brief to be defective solely due to Appellant's failure

to provide a summary of the claimed subject matter as required by 37 CFR §41/37(c)(1)(v). Appellant provides the entire Appeal Brief herewith less the Appendices because separate subheadings were added in the Argument section of the Appeal Brief.

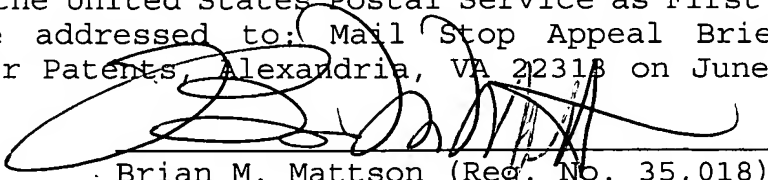
The required fee for filing Appellant's Appeal Brief was paid on February 26, 2008. Therefore, Appellant submits that no fee is required for filing Appellant's Appeal Brief. However, Appellant authorizes the Patent Office to charge any fees that may be due and owing or to credit any overpayment to Deposit Account No. 50-0595. A duplicate copy of this letter is enclosed for this purpose.

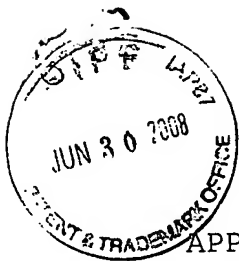
Respectfully submitted,


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CERTIFICATE OF MAILING

I hereby certify that this **APPEAL BRIEF, APPEAL BRIEF TRANSMITTAL (in duplicate) and Return Receipt Postcard** are being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Mail Stop Appeal Brief-Patents, Commissioner for Patents, Alexandria, VA 22318 on June 25, 2008.


Brian M. Mattson (Reg. No. 35,018)



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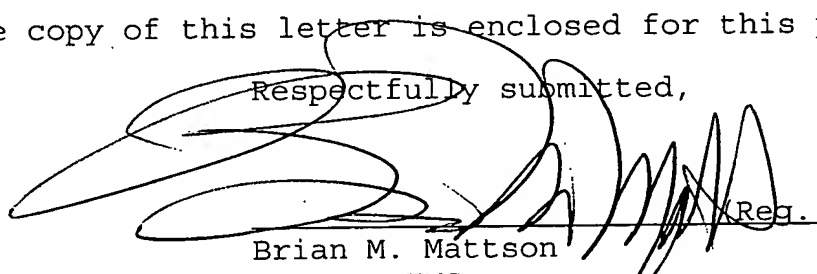
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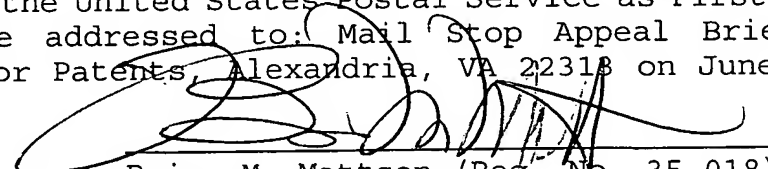


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APPEAL BRIEF

SIR/MADAM:

This Appeal Brief is filed in support of the Notice of Appeal dated December 26, 2007. The Appeal was taken from a Final Rejection dated October 26, 2007.

I. REAL PARTY IN INTEREST

Valerie Kazich is the real party in interest in this Appeal.

II. RELATED APPEALS AND INTERFERENCES

No other appeals or interferences are known to Appellant or Appellant's legal representative which will directly affect, be directly affected by, or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS

Claims 1-20 are pending in this patent application. Claims 1-20 were finally rejected by the Examiner in a Final Rejection dated October 26, 2007 and are hereby on appeal. A copy of Claims 1-20

which are subject to this appeal are appended hereto as the Claims Appendix. The Final Rejection is appended hereto as Exhibit A of the Evidence Appendix.

IV. STATUS OF AMENDMENTS

All amendments have been entered in this patent application. No amendments to the claims were made after the Final Rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The present invention generally relates to an apparatus, a system and a method used during consumption of a frozen treat. More specifically, the present invention relates to an apparatus, a system and a method for collecting drips from a frozen treat on a stick with a handle which extends from the frozen treat.

Independent Claim 1 defines an apparatus for collecting drips from a frozen treat. FIG. 1 illustrates an apparatus 10 for collecting drips from a frozen treat 11 that may be mounted on a stick that may have a handle 13. (See page 9, lines 21-28.) Claim 1 requires a base defined by a perimeter wherein the base has a center point and the perimeter is equidistant from the center point. The base 12 may have a shape, such as, for example, a square, a rectangle, a circle, an oval, a triangle, a star and/or the like. (See page 10, lines 7-10.) The base 12 may have a perimeter 14. (See page 10, line 10.)

Further, independent Claim 1 requires that the base has a top layer covering a bottom layer wherein the base is planar. The

base 12 may have a top side 18 and a bottom side 20 which may be opposite to the top side 18. (See page 10, lines 11-12.) The base 12 may have a cover 24 attached to the base 12. (See page 10, line 26.) The cover 24 may have a first side 26 and a second side 28 which may be opposite to the first side 26. (See page 10, lines 27-28.) The cover 24 may have a perimeter 30 (See page 10, lines 27-28.) The second side 28 of the cover 24 may cover the top side 18 of the base 12. (See page 11, lines 3-4.) The cover 24 may be placed over the top side 18 of the base 12. (See page 11, lines 4-5.) The cover 24 may have the same shape and/or a similar shape of the base 12. (See page 11, lines 13-14.)

Still further, independent Claim 1 requires that the bottom layer is made from a material that is rigid wherein the top layer is made from an absorbent material. The base 12 may be made from a material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like. (See page 10, lines 5-7.) The cover 24 may be a pad, such as, for example, a paper napkin, a coffee filter and/or a paper towel. (See page 10, lines 29-30.) Further, the cover 24 may be made from an absorbent material, such as, for example, a cotton fiber, a wood pulp fiber, a cellulose fiber, a polypropylene and/or the like. (See page 10, lines 30-33.) Still further, Claim 1 requires that the top layer has an outer edge wherein the bottom layer extends to a point outside of the outer edge of the top layer without overlapping the

top layer. The perimeter 30 of the cover 24 may be less than the perimeter 14 of the base 12. (See page 11, lines 9-10.)

Still further, independent Claim 1 requires a lip integrally formed on the perimeter of the base wherein the lip extends to a point above the top layer wherein the lip is perpendicular to the base wherein the outer edge of the top layer is adjacent to the lip without overlapping the lip. As illustrated in FIG. 1, the base 12 may have a lip 22 on the perimeter 14 of the base 12. (See page 10, lines 12-13.) The lip 22 may extend outward with respect to the top side 18 of the base 12. (See page 10, lines 14-15.) When the second side 28 of the cover 24 is attached to the top side 18 of the base 12, the perimeter 30 of the cover 24 may be located within the perimeter 14 and the lip 22 of the base. (See page 11, lines 10-13.) The drips may collect and/or may form pools on the top side 18 of the base 12. (See page 13, lines 20-22.) Further, the lip 22 may prevent the drips which have pooled on the top side 18 of the base 12 from flowing beyond the perimeter 14 of the base 12. Moreover, the lip 22 may protect the hand of the user and/or the surroundings of the user from the drips of the frozen treat 11. (See page 14, lines 21-27.)

Moreover, independent Claim 1 requires a passage at the center point of the base wherein the passage forms an opening through the top layer of the base and the bottom layer of the base. As illustrated in FIG. 1, the base 12 and the cover 24 may have an

opening 32 which may allow for passage of the handle 13 of the frozen treat 11. (See page 11, lines 22-24.)

Dependent Claim 2 further defines the apparatus of independent Claim 1 and requires that the bottom layer of the base is plastic. The base 12 may be made from a material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like. (See page 10, lines 5-7.)

Dependent Claim 3 further defines the apparatus of independent Claim 1 and requires that the absorbent material is paper. The cover 24 may be a pad, such as, for example, a paper napkin, a coffee filter and/or a paper towel. (See page 10, lines 29-30.) Further, the cover 24 may be made from an absorbent material, such as, for example, a cotton fiber, a wood pulp fiber, a cellulose fiber, a polypropylene and/or the like. (See page 10, lines 30-33.)

Independent Claim 8 defines an apparatus for collecting drips from a frozen treat mounted on a stick. FIG. 1 illustrates an apparatus 10 for collecting drips from a frozen treat 11 that may be mounted on a stick that may have a handle 13. (See page 9, lines 21-28.) Claim 8 requires a base defined by a perimeter wherein the base has a center point and the perimeter is equidistant from the center point wherein the base has a top side and a bottom side positioned opposite to the top side wherein the base is planar wherein the base is made from a material that is

rigid. The base 12 may have a shape, such as, for example, a square, a rectangle, a circle, an oval, a triangle, a star and/or the like. (See page 10, lines 7-10.) The base 12 may have a perimeter 14. (See page 10, line 10.) The base 12 may have a top side 18 and a bottom side 20 which may be opposite to the top side 18. (See page 10, lines 11-12.) The base 12 may be made from a material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like. (See page 10, lines 5-7.)

Further, independent Claim 8 requires a lip on the perimeter of the base wherein the lip extends outward perpendicularly with respect to the top side of the base. As illustrated in FIG. 1, the base 12 may have a lip 22 on the perimeter 14 of the base 12. (See page 10, lines 12-13.) The lip 22 may extend outward with respect to the top side 18 of the base 12. (See page 10, lines 14-15.)

Still further, independent Claim 8 requires an absorbing means covering the top side of the base wherein the absorbing means is located inside the perimeter of the base wherein the lip extends to a point above the absorbing means wherein the absorbing means has an outer edge wherein the outer edge of the absorbing means is adjacent to the lip wherein the base extends to a point outside of the outer edge of the absorbing means without overlapping the absorbing means. The base 12 may have a cover 24 attached to the

base 12. (See page 10, line 26.) The cover 24 may have a first side 26 and a second side 28 which may be opposite to the first side 26. (See page 10, lines 27-28.) The cover 24 may have a perimeter 30 (See page 10, lines 27-28.) The second side 28 of the cover 24 may cover the top side 18 of the base 12. (See page 11, lines 3-4.) The cover 24 may be placed over the top side 18 of the base 12. (See page 11, lines 4-5.) The cover 24 may have the same shape and/or a similar shape of the base 12. (See page 11, lines 13-14.) The cover 24 may be a pad, such as, for example, a paper napkin, a coffee filter and/or a paper towel. (See page 10, lines 29-30.) Further, the cover 24 may be made from an absorbent material, such as, for example, a cotton fiber, a wood pulp fiber, a cellulose fiber, a polypropylene and/or the like. (See page 10, lines 30-33.) The perimeter 30 of the cover 24 may be less than the perimeter 14 of the base 12. (See page 11, lines 9-10.) When the second side 28 of the cover 24 is attached to the top side 18 of the base 12, the perimeter 30 of the cover 24 may be located within the perimeter 14 and the lip 22 of the base. (See page 11, lines 10-13.) The drips may collect and/or may form pools on the top side 18 of the base 12. (See page 13, lines 20-22.) Further, the lip 22 may prevent the drips which have pooled on the top side 18 of the base 12 from flowing beyond the perimeter 14 of the base 12. Moreover, the lip 22 may protect the hand of the user and/or the surroundings of the user from the drips of the frozen treat 11.

(See page 14, lines 21-27.)

Still further, independent Claim 8 requires a slit in the base for supporting the stick of the frozen treat in a nonparallel position with respect to the base within the perimeter of the base wherein the slit in the base is located at the center point of the base. As illustrated in FIG. 1, the base 12 may have an opening 32 which may allow for passage of the handle 13 of the frozen treat 11. (See page 11, lines 22-24.) The opening 32 may be formed by a first slit 34 and a second slit 36 which may be perpendicular to the first slit 34. The opening 32 may be formed by a single slit. (See page 11, lines 26-29.)

Moreover, independent Claim 8 requires an opening in the absorbing means wherein the opening extends through the absorbing means wherein the opening overlaps the slit in the base. As illustrated in FIG. 1, the cover 24 may have an opening 32 which may allow for passage of the handle 13 of the frozen treat 11. (See page 11, lines 22-24.) The opening may allow the handle 13 to pass from the first side 26 of the cover 24 to the bottom side 20 of the base 12. (See page 11, lines 29-32.)

Independent Claim 13 defines a method for collecting drips from a frozen treat mounted on a stick. FIG. 1 illustrates a method for collecting drips from a frozen treat 11 that may be mounted on a stick that may have a handle 13. (See page 9, lines 21-28.) Claim 13 requires the step of providing a base defined by

a first perimeter wherein the base has a first center point and the first perimeter is equidistant from the first center point wherein the base has a first side and a second side wherein the second side is positioned opposite to the first side wherein the base is planar wherein the base is made from a material that is rigid. FIG. 1 illustrates the step of providing the base 12 that may have a shape, such as, for example, a square, a rectangle, a circle, an oval, a triangle, a star and/or the like. (See page 10, lines 7-10.) The base 12 may have a perimeter 14. (See page 10, line 10.) The base 12 may have a top side 18 and a bottom side 20 which may be opposite to the top side 18. (See page 10, lines 11-12.) The base 12 may be made from a material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like. (See page 10, lines 5-7.)

Further, independent Claim 13 requires the step of providing a cover defined by a second perimeter wherein the cover has a second center point and the second perimeter is equidistant from the second center point wherein the cover has a first side and a second side wherein the second side is positioned opposite to the first side wherein the second perimeter is less than the first perimeter and further wherein the cover is an absorbent material. FIG. 1 illustrates the step of providing a cover 24 attached to the base 12. (See page 10, line 26.) The cover 24 may have a first side 26 and a second side 28 which may be opposite to the first

side 26. (See page 10, lines 27-28.) The cover 24 may have a perimeter 30 (See page 10, lines 27-28.) The second side 28 of the cover 24 may cover the top side 18 of the base 12. (See page 11, lines 3-4.) The cover 24 may be placed over the top side 18 of the base 12. (See page 11, lines 4-5.) The cover 24 may have the same shape and/or a similar shape of the base 12. (See page 11, lines 13-14.) The cover 24 may be a pad, such as, for example, a paper napkin, a coffee filter and/or a paper towel. (See page 10, lines 29-30.) Further, the cover 24 may be made from an absorbent material, such as, for example, a cotton fiber, a wood pulp fiber, a cellulose fiber, a polypropylene and/or the like. (See page 10, lines 30-33.) The perimeter 30 of the cover 24 may be less than the perimeter 14 of the base 12. (See page 11, lines 9-10.) When the second side 28 of the cover 24 is attached to the top side 18 of the base 12, the perimeter 30 of the cover 24 may be located within the perimeter 14 and the lip 22 of the base. (See page 11, lines 10-13.)

Still further, independent Claim 13 requires the step of providing a lip on the first perimeter wherein the lip is perpendicular to the base. FIG. 1 illustrates the step of providing a lip 22 on the perimeter 14 of the base 12. (See page 10, lines 12-13.) The lip 22 may extend outward with respect to the top side 18 of the base 12. (See page 10, lines 14-15.)

Still further, independent Claim 13 requires the step of

connecting the second side of the cover to the first side of the base wherein the perimeter of the cover is adjacent to the lip on the base wherein the lip on the base extends to a point above the first side of the cover. When the second side 28 of the cover 24 is attached to the top side 18 of the base 12, the perimeter 30 of the cover 24 may be located within the perimeter 14 and the lip 22 of the base. (See page 11, lines 10-13.) The drips may collect and/or may form pools on the top side 18 of the base 12. (See page 13, lines 20-22.) Further, the lip 22 may prevent the drips which have pooled on the top side 18 of the base 12 from flowing beyond the perimeter 14 of the base 12. Moreover, the lip 22 may protect the hand of the user and/or the surroundings of the user from the drips of the frozen treat 11. (See page 14, lines 21-27.)

Moreover, independent Claim 13 requires the step of providing an opening through the cover and the base wherein the opening extends from the first side of the cover to the second side of the base wherein the opening is located at the first center point and the second center point. FIG. 1 illustrates the step of providing an opening 32 through the base 12 and the cover 24 which may allow for passage of the handle 13 of the frozen treat 11. (See page 11, lines 22-24.) The opening 32 may allow the handle 13 to pass from the first side 26 of the cover 24 to the bottom side 20 of the base 12. (See page 11, lines 29-32.)

Dependent Claim 17 further defines the method of

independent Claim 13 and requires the step of laminating the cover. A protective layer 70 may be applied to the cover 24 and/or may cover the cover 24, the first side 26 of the cover 24 and/or the second side 28 of the cover 24. The protective layer 70 may be made with a laminating material, such as, for example, an orthophthalic polyester resin and/or the like. The protective layer 70 may be, for example, a clear transparent material. The laminating surface may have adhesive qualities. Further, the lamination may secure the cover 24 to the top side 18 of the base with, for example, the adhesive qualities, or the like. (See FIG. 6 and page 18, lines 9-17.)

Dependent Claim 18 further defines the method of independent Claim 13 and requires the step of inserting the stick of the frozen treat into the opening of the cover and the base. The opening 32 may allow the handle 13 or the two handles of the double-stick frozen treat to pass from the first side 26 of the cover 24 to the bottom side 20 of the base 12. (See FIG. 1 and page 11, lines 29-32.)

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Do Claims 1-20 contain new matter under 35 U.S.C. §112, first paragraph, that is not supported by the specification as originally filed?

2. Would Claims 1-3, 8, 13, 17 and 18 have been obvious under 35 U.S.C. §103(a) to one having ordinary skill in the art at the

time of Appellant's invention over Ackalusky (U.S. Patent No. 2,803,550) in view of Taylor (U.S. Patent No. 2,735,778) or vice versa, i.e., Taylor in view of Ackalusky, both further in view of Perkins (U.S. Patent Publication No. 2003/0087011), Pagnini (U.S. Patent No. 3,306,512), Blant (Great Britain Patent No. 2,293,751), Rizzuto (U.S. Patent No. 4,938,411), Oshio (U.S. Patent Publication No. 2002/0029697), Suzuya Shokuhin (Japanese Patent No. 11-137179) and Smith (U.S. Patent No. 5,770,250), essentially for the reasons fully and clearly detailed in the Non-Final Office Action mailed December 5, 2006, further in view of Goodwin (U.S. Patent No. 4,756,939), Miller (U.S. Patent No. 4,321,997), Rhodes et al. (U.S. Patent No. 4,940,621) and Hansen et al. (U.S. Patent No. 4,865,855)? See the Non-Final Office Action mailed December 5, 2006 attached as Exhibit B of the Evidence Appendix. See Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al. attached as Exhibits C, D, E, F, G, H, I, J, K, L, M, N, and O, respectively, of the Evidence Appendix.

3. Would Claims 4-7, 9-12, 14-16, 19 and 20 have been obvious under 35 U.S.C. §103(a) to one having ordinary skill in the art at the time of Appellant's invention in view of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al., and Hansen et al. further in view of Huffer et al. (U.S. Patent No. 6, 457,585), Penick et al. (U.S.

Patent No. 4,336,664), *Freedman et al.* (U.S. Patent No. 2,585,924), *Lipper* (U.S. Patent No. 6,814,234), *Moravick et al.* (U.S. Patent No. 3,704,892), *Shin* (U.S. Patent No. 4,648,548), *Knoerzer et al.* (U.S. Patent No. 6,746,743), *Gottschalk* (U.S. Patent No. 3,835,564), *Goldstein* (U.S. Patent No. 3,100,642), *Witkowski et al.* (U.S. Patent No. 5,676,401), *McClung et al.* (U.S. Patent No. 6,755,711) and *Bellet* (U.S. Patent No. 2,711,541)? See *Huffer et al.*, *Penick et al.*, *Freedman et al.*, *Lipper*, *Moravick et al.*, *Shin*, *Knoerzer et al.*, *Gottschalk*, *Goldstein*, *Witkowski et al.*, *McClung et al.* and *Bellet* attached as Exhibits P, Q, R, S, T, U, V, W, X, Y, Z and AA, respectively, of the Evidence Appendix.

VII. ARGUMENT

A. THE REJECTION OF CLAIMS 1-20 UNDER 35 U.S.C. §112, FIRST PARAGRAPH

Claims 1-20 stand rejected under 35 U.S.C. §112, first paragraph, for containing new matter not supported by the specification as originally filed.

In the Final Rejection, the Examiner stated:

The recitations, in Claims 1, 8 and 13, that the bottom (layer of the base) or base is "rigid", appears to be new matter, not supported by the specification. Also, the recitations, in Claims 1, 8 and 13, that the lip extends above the top layer or the absorbing means, also appears to be new matter, not supported by the specification as originally filed.

(See Final Rejection, Page 2 of Exhibit A of the Supplemental Appendix.)

**B. CLAIMS 1, 8 AND 13 DO NOT CONTAIN
NEW MATTER AND ARE SUPPORTED BY
THE SPECIFICATION AS ORIGINALLY FILED**

With respect to the rejection of independent Claims 1, 8 and 13 under 35 U.S.C. §112, first paragraph, Appellant asserts that independent Claims 1, 8 and 13 do not contain new matter and are supported by the specification as originally filed for the reasons that follow.

The Examiner alleged that Appellant's recitations in independent Claims 1, 8 and 13 that the bottom (layer of the base) or base is "rigid" are new matter. Further, the Examiner alleged that Appellant's recitations in independent Claims 1, 8 and 13 that the lip extends above the top layer or the absorbing means are new matter. Appellant respectfully submits that the specification as originally filed clearly enables a person skilled in the art at the time of Appellant's invention to which it pertains, or with which it is most nearly connected, to make and use the invention claimed in independent Claims 1, 8 and 13.

Independent Claim 1 requires a base defined by a perimeter wherein the base has a top layer covering a bottom layer. Further, independent Claim 1 requires that the bottom layer is made from a material that is rigid. Moreover, independent Claim 1 requires a lip integrally formed on the perimeter of the base wherein the lip extends to a point above the top layer.

Independent Claim 8 requires a base defined by a perimeter

wherein the base is made from a material that is rigid. Further, independent Claim 8 requires a lip on the perimeter of the base and an absorbing means covering the top side of the base. Moreover, independent Claim 8 requires that the lip extends to a point above the absorbing means.

Independent Claim 13 requires that step of providing a base defined by a first perimeter wherein the base is made from a material that is rigid. Further, independent Claim 13 requires the step of providing a cover and a lip on the base wherein the lip extends to a point above the first side of the cover.

FIG. 1 clearly illustrates that the base 12 has a lip 22 on the perimeter 14 of the base 12 that extends to a point above the top layer. (See page 10, lines 12-13.) The base 12 may be made from a material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like. (See page 10, lines 5-7). Moreover, the drips may collect and/or may form pools on the top side 18 of the base 12. (See page 13, lines 20-22). Further, the lip 22 may prevent the drips which have pooled on the top side 18 of the base 12 from flowing beyond the perimeter 14 of the base 12.

Appellant submits that a common dictionary definition of "rigid" is "not flexible or pliant; stiff." (See Answer.com definition of "rigid" attached hereto as Exhibit BB of the Evidence Appendix.) Appellant submits that any of cellulose fiber, plywood,

plastic, polyethylene, and/or polyurethane are a "rigid" material because any may be formed as not flexible or pliant and/or as stiff. Therefore, the specification as originally filed enables a person skilled in the art at the time of Appellant's invention to make and use the base from a "rigid" material, such as, for example, cellulose fiber, plywood, plastic, polyethylene, polyurethane and/or the like as required by independent Claims 1, 8 and 13. Moreover, Appellant submits that for drips to collect and/or form pools on the top side of the base and/or for the lip to prevent the drips which have pooled on the top side of the base from flowing beyond the perimeter of the base, the lip must extend to a point above the top layer or the absorbing means. Appellant respectfully submits that the collection and pooling described in the specification as originally filed enabled a person skilled in the art at the time of Appellant's invention to make and use the invention claimed in independent Claims 1, 8 and 13.

In view of the foregoing, since independent Claims 1, 8 and 13 do not contain new matter and are supported by the specification as originally filed, the rejection of Claims 1-20 under 35 U.S.C. §112, first paragraph, is improper and should be reversed.

**C. THE CITED REFERENCES AND THE
REJECTIONS OF CLAIMS 1-3, 8, 13, 17 AND 18
UNDER 35 U.S.C. §103(a)**

Claims 1-3, 8, 13, 17 and 18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky* in view of *Taylor* or

vice versa, i.e., *Taylor* in view of *Ackalusky*, both further in view of *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin* and *Smith*, further in view of *Goodwin*, *Miller*, *Rhodes et al.* and *Hansen et al.*

In the Final Rejection, the Examiner stated:

In Regard to Claim 1, *Ackalusky* discloses it was well established in the art to provide an apparatus for collecting drips from a frozen treat, the apparatus comprising a base defined by a perimeter wherein the base has a center point and the perimeter is equidistant from the center point (*Ackalusky* disclosing square or round bases - col. 2, para. 4) and wherein the base has a top layer (24) covering a bottom layer (18) wherein the base is planar and the bottom layer is made from a material that is substantially rigid in that it is self-supporting and is made of some of the same materials disclosed by Applicant (e.g., plastic and cardboard, molded wood pulp, etc.); and wherein the top layer is an absorbent material and the bottom layer extends to a point outside the outer edge of the top layer without overlapping the top layer; said apparatus further comprising a lip (14) integrally formed on the perimeter of the base (actually, the bottom layer) wherein the lip extends to a point above the top layer and wherein the lip is perpendicular to the base, and a passage at the center point of the base, wherein the passage forms an opening through the top layer of the base and the bottom layer of the base. *Taylor*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin* and *Smith* are relied on as further evidence that it was notoriously conventional to provide anti-drip devices, including ones with upstanding lips like *Ackalusky* and Applicant's, which lips or upstanding walls help to retain the drippings (which is, of course, Applicant's reason for providing upstanding walls). Claim 1 arguably differs from *Ackalusky* in the recitation that the outer edge of the top layer is "adjacent" to the lip (i.e., how close is "adjacent?"). *Ackalusky* does not appear to disclose the extent of the top absorbing layer, other than to show it in the figures. *Ackalusky* provides the top absorbing layer for the reason Applicant employs the layer and that is to absorb the drippings. Therefore, since *Ackalusky* is employing the top layer for its art recognized and

Applicant's intended function, the extent of the top layer, or its dimensions, if you will, is seen to have been an obvious matter of degree and an obvious result effective variable, routinely determinable, and an obvious optimization at best, based on such variables as the degree of absorbency of the material (which is a function of the absorbent properties of the material itself, its thickness, etc.) In any case, *Taylor* can be relied on as evidence to show it was well known to extend the absorbent material substantially over the lower support layer of a drip guard and *Goodwin, Miller, Rhodes et al.* and *Hansen et al.* disclose it was well established to have a moisture absorbent top layer extend to adjacent the lip or upturned walls of a bottom layer or tray structure (which is what the claims recite). To modify *Ackalusky* and extend the top absorbent layer adjacent to the lip (or upturned wall) of the base would therefore have been obvious for the reasons given above. *Goodwin, Miller, Rhodes et al.* and *Hansen et al.* are all analogous art since they are all directed to the same generic problem that *Ackalusky* and Applicant are concerned with; i.e., catching and retaining drippings in an enclosure. Claims 2, 3, 8, 13, 17 and 18 are rejected for the reasons given both above and in the last Office Action.

(See Final Rejection, Pages 2-4 of Exhibit A of the Supplemental Appendix.)

**D. CLAIMS 1-3, 8, 13, 17 AND 18 WOULD NOT HAVE BEEN
OBVIOUS TO ONE HAVING ORDINARY SKILL IN THE ART
AT THE TIME OF APPELLANT'S INVENTION OVER ACKALUSKY
IN VIEW OF TAYLOR OR VICE VERSA, BOTH FURTHER
IN VIEW OF PERKINS, PAGNINI, BLANT, RIZZUTO,
OSHIO, SUZUYA SHOKUHHIN AND SMITH, FURTHER IN VIEW
OF GOODWIN, MILLER, RHODES ET AL. AND HANSEN ET AL.**

With respect to the rejection of Claims 1-3, 8, 13, 17 and 18 under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky* in view of *Taylor* or vice versa, i.e., *Taylor* in view of *Ackalusky*, both further in view of *Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin* and *Smith*, further in view of *Goodwin, Miller, Rhodes et al.* and *Hansen et al.*, Appellant respectfully submits

that Claims 1-3, 8, 13, 17 and 18 distinctly define the present invention from *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and *Hansen et al.* for the reasons that follow.

i. CLAIMS 1, 8 AND 13

Independent Claim 1 requires a bottom layer that is made from a material that is rigid. Further, independent Claim 1 requires a lip on the base that extends to a point above the top layer. Still further, independent Claim 1 requires that the bottom layer extends to a point outside of the outer edge of the top layer without overlapping the absorbing means. Moreover, independent Claim 1 requires that the outer edge of the top layer is adjacent to the lip.

Independent Claim 8 requires a base that is made of a material that is rigid. Still further, independent Claim 8 requires that the base extends to a point outside of the outer edge of the absorbing means without overlapping the absorbing means. Still further, Claim 8 requires that the lip extends to a point above the absorbing means. Moreover, independent Claim 8 requires that the outer edge of the absorbing means is adjacent to the lip.

Independent Claim 13, as amended, requires that the base is made from a material that is rigid. Still further, independent Claim 13 requires that the perimeter of the cover is less than the perimeter of the base. Still further, independent Claim 13

requires that the perimeter of the cover is adjacent to the lip on the base. Moreover, Claim 13 requires that the lip extends to a point above the first side of the cover.

Ackalusky merely teaches an apparatus containing a vinyl resin or polyethylene open-top preshaped container guard with a resilient sponge rubber sealing block secured about an opening in the guard. Further, the sealing block does not extend to the lip of the container guard.

Taylor merely teaches a shield disposed against the base of a frozen confection that has a passage through which the handle extends. Further, the moisture-absorbing material 9 resides on a foldable base 6 (See *Taylor*, FIG. 1 and col. 2, lines 44-48.), in contrast to the rigid base of the present invention. Still further, the moisture-absorbing material extends to the edge of the base, and the moisture-absorbing material and the base share the same perimeter (See *Taylor*, FIG. 1.), in contrast to the base that extends to a point outside of the outer edge of the absorbing means and has a larger perimeter than the perimeter of the absorbing means as required by the claims of the present invention. Moreover, the base has a lateral portion connected to the edge of the base that extends downwardly in a direction away from the body lengthwise of the handle.

Perkins merely teaches a frozen confectionery accessory 10 made from a flexible plastic or rubber cup 12 having a lip

capturing cavity 18. The accessory has a reinforced slot for stick insertion 14, and the walls of the cup 12 extend in a non-perpendicular fashion from the bottom of the cup. (See *Perkins*, FIGS. 1-4 and 6 and col. 2, para. 12.)

Pagnini merely teaches a shallow saucer-like tray which is applicable and removable and which is provided at its center with an opening through the tapering body portion. (See *Pagnini*, FIGS. 1-3 and col. 1, lines 59-62.)

Blant merely teaches a drip tray 10 having a flat plate portion 12 that extends radially outward from a stick-engaging aperture 14 which allows passage of a lollipop stick or the like. (See *Blant*, FIGS. 1-2 and page 3, lines 4-7.)

Rizzuto merely teaches a drip catching device 10 having a substantially planar member 12 which can be formed of a liquid absorbing material, such as webbed paper. (See *Rizzuto*, FIGS. 1-3 and col. 2, lines 20-23.)

Oshio merely teaches an apparatus to catch drippings from an ice cream bar or treat that has an upper cup portion 2 that may be removably mounted on top of the handle portion 4. The handle 4 is tapered to ensure that when the upper cup portion 2 is placed on top of and over the handle 4, the upper cup portion 2 would move down until a certain point and would then removably rest on the handle 4. (See *Oshio*, FIG. 3 and page 2, para. 21.)

Suzuya Shokuhin merely teaches an apparatus having a cup with

a hole for receiving an ice cream cone. The apparatus may be round or square in shape. (See *Oshio*, FIGS. 1-6.)

Smith merely teaches a drip-absorbing article for use while consuming frozen treats. A slit 22 in the sponge 20 is aligned with a slit 12 in the cover 10. The slits 12 and 22 extend through the cover 10 and the sponge 20, respectively, and are adapted to receive a portion of a stick handle 30 which is embedded in a frozen treat. (See *Smith*, FIG. 1 and col. 3, lines 22-32.)

Goodwin merely teaches an absorbent pad adapted for placement in a package beneath a food product having a tendency to exude fluid. *Miller* merely teaches a receptacle for containing and displaying food products which tend to exude juices or liquids, and which comprises a supporting member, such as a tray or bag, and an absorbent pad associated therewith. *Rhodes et al.* merely teach an absorbent pad for meat and poultry products and the like and a method for constructing the same. *Hansen et al.* merely teaches an absorbent food pad which absorbs exudate from food products in a package and inhibits the propagation of food-borne pathogens.

Nowhere do *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*, *Goodwin*, *Miller*, *Rhodes et al.* or *Hansen et al.*, taken singly or in combination, teach or suggest that the outer edge of the top layer is adjacent to the lip, that the outer edge of the absorbing means is adjacent to the lip or that the perimeter of the cover is adjacent to the lip on

the base as required by independent Claims 1, 8 and 13, respectively. The Patent Office admits that Ackalusky does not disclose an extent of the perimeter of the top absorbing layer, other than to show it in the figures. On the contrary, Ackalusky teaches that the rectangular block of sponge rubber 24 surrounds the opening 20 around the stick 28 (and is not adjacent to the walls 12 of the guard 14) to prevent running of the drippings through the opening 20. (See Ackalusky, FIGS. 2 and 3 and col. 2, lines 19-21.)

Further, nowhere do Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. or Hansen et al., taken singly or in combination, teach or suggest a bottom layer or a base that is made from a material that is rigid, as required by independent Claims 1, 8 and 13. Further, nowhere do Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. or Hansen et al., taken singly or in combination, teach or suggest a lip on the base that extends to a point above the top layer, the absorbing means or the first side of the cover, as required by independent Claims 1, 8 and 13, respectively. Still further, nowhere do Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. or Hansen et al., taken singly or in combination, teach or suggest that the bottom layer or the base extends to a point

outside of the outer edge of the top layer without overlapping the absorbing means or that the second perimeter is less than the first perimeter as required by independent Claims 1, 8 and 13, respectively.

Moreover, a person of ordinary skill in the art would never have been motivated to combine *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* or *Hansen et al.* in the manner suggested by the Patent Office in formulating the rejection under 35 U.S.C. §103(a). It is submitted that the question under §103 is whether the totality of the art would collectively suggest the claimed invention to one of ordinary skill in this art. In re Simon, 461 F.2d 1387, 174 USPQ 114 (CCPA 1972).

That elements, even distinguishing elements, are disclosed in the art is alone insufficient. It is common to find elements somewhere in the art. Moreover, most if not all elements perform their ordained and expected functions. The test is whether the invention as a whole, in light of all of the teachings of the references in their entirety, would have been obvious to one of ordinary skill in the art at the time the invention was made. Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983).

With the analysis of the deficiencies of *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith,*

Goodwin, Miller, Rhodes et al. and *Hansen et al.*, taken singly or in combination, as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and/or *Hansen et al.* to produce the claimed invention. Therefore, *prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103. Therefore, Appellant submits that the rejection of independent Claims 1, 8 and 13 under 35 U.S.C. §103(a) is improper and should be reversed.

ii. CLAIM 2

Dependent Claim 2 depends from independent Claim 1 and further requires that the bottom layer is plastic. On page 3 of the Office Action dated December 5, 2006, the Patent Office admits that Claim 2 differs from *Taylor* in the recitation that the base is plastic whereas *Taylor* discloses a nonabsorbent paper material. *Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin* and *Smith* all merely teach drip trays that are made of some type of plastic. *Goodwin, Miller, Rhodes et al.* and *Hansen et al.* all merely teach absorbent food pads that may be made from plastic. Nowhere do *Ackalusky* and/or *Taylor* in view of *Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and/or *Hansen et al.*, teach or suggest the apparatus of

independent Claim 1 from which Claim 2 depends. Therefore, Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al., taken singly or in combination, fail to teach or suggest the apparatus of independent Claim 1 wherein the bottom layer is plastic. The differences between Claim 2 and the teaching of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al. are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person of ordinary skill in the art.

With the analysis of the deficiencies of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al., as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and/or Hansen et al., to produce the claimed invention. *Prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103. Dependent Claim 2 is further believed allowable over the references of record for the same reasons set forth above with respect to independent Claim 1 since it sets forth additional novel elements of Appellant's apparatus. Therefore, Appellant submits

that the rejection of dependent Claim 2 under 35 U.S.C. §103(a) is improper and should be reversed.

iii. CLAIM 3

Dependent Claim 3 depends from independent Claim 1 and further requires that the absorbent material is paper. Nowhere do Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. or Hansen et al., taken singly or in combination, teach or suggest the apparatus of independent Claim 1 wherein the absorbent material is paper. Therefore, Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al., taken singly or in combination, fail to teach or suggest the apparatus of independent Claim 1 wherein the absorbent material is paper. The differences between Claim 3 and the teachings of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al. are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person of ordinary skill in the art.

With the analysis of the deficiencies of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al., as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine

Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and/or Hansen et al., to produce the claimed invention. *Prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103. Dependent Claim 3 is further believed allowable over the references of record for the same reasons set forth above with respect to independent Claim 1 since it sets forth additional novel elements of Appellant's apparatus. Therefore, Appellant submits that the rejection of dependent Claim 3 under 35 U.S.C. §103(a) is improper and should be reversed.

iv. CLAIM 17

Dependent Claim 17 depends from independent Claim 13 and further requires the step of laminating the cover. Nowhere do *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. or Hansen et al.*, taken singly or in combination, teach or suggest the step of laminating the cover. Therefore, *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al.*, taken singly or in combination, fail to teach or suggest the step of laminating the cover. The differences between Claim 17 and the teachings of *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al. and Hansen et al.* are such that the subject matter as a whole would not have been

obvious at the time the invention was made to a person of ordinary skill in the art.

With the analysis of the deficiencies of *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and *Hansen et al.*, as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and/or *Hansen et al.*, to produce the claimed invention. *Prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103. Dependent Claim 17 is further believed allowable over the references of record for the same reasons set forth above with respect to independent Claim 13 since it sets forth additional novel steps of Appellant's method. Therefore, Appellant submits that the rejection of dependent Claim 17 under 35 U.S.C. §103(a) is improper and should be reversed.

v. CLAIM 18

Dependent Claim 18 depends from independent Claim 13 and further requires the step of inserting the stick of the frozen treat into the opening of the cover and the base. Nowhere do *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* or *Hansen et al.*, taken singly or in combination, teach or suggest the method of

independent Claim 13 having the step of inserting the stick of the frozen treat into the opening of the cover and the base. Therefore, *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and *Hansen et al.*, taken singly or in combination, fail to teach or suggest the step of inserting the stick of the frozen treat into the opening of the cover and the base. The differences between Claim 18 and the teachings of *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and *Hansen et al.* are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person of ordinary skill in the art.

With the analysis of the deficiencies of *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and *Hansen et al.*, as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.* and/or *Hansen et al.*, to produce the claimed invention. *Prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103. Dependent Claim 18 is further believed allowable over the referenced of record for the same reasons set forth above with respect to independent Claim 13 since it sets forth additional

novel steps of Appellant's method. Therefore, Appellant submits that the rejection of dependent Claim 18 under 35 U.S.C. §103(a) is improper and should be reversed.

**E. THE CITED REFERENCES AND THE REJECTIONS
OF CLAIMS 4-7, 9-12, 14-16, 19 AND 20
UNDER 35 U.S.C. §103(a)**

Claims 4-7, 9-12, 14-16, 19 and 20 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al.*, and *Hansen et al.* further in view of *Huffer et al.*, *Penick et al.*, *Freedman et al.*, *Lipper, Moravick et al.*, *Shin, Knoerzer et al.*, *Gottschalk, Goldstein, Witkowski et al.*, *McClung et al.* and *Bellet*.

In the Final Rejection, the Examiner stated:

Claims 4-7 differ from the combination in the recitation that an adhesive sticker, a washable tattoo, a partition in the base or a mark is associated with the base, respectively. As evidenced by *Huffer et al.*, *Penick et al.*, *Freedman et al.*, *Lipper, Moravick et al.*, *Shin, Knoerzer et al.*, *Gottshalk, Goldstein, Witkowski et al.*, *McClung et al.* and *Bellet*, it was notoriously conventional to provide an article that is to be associated with a product (such as a package associated with contents) with adhesive stickers, or washable tattoos, or partitions in the article such as the package (to allow for separation of an article of interest) or a mark. To modify the combination and provide these conventional elements for their art recognized an Applicants intended function would therefore have been obvious. Claims 9-12, 14 and 15 are rejected for the reasons given above.

In regards to Claims 9-12, the particular layer that the elements recited (such as the sticker or partition) are attached to, or associated with, is seen to have been an obvious matter of choice. Claims 19 and 20 recite that the cover is removed from the base and the base is

used as a disk. The art taken as a whole discloses that the cover can be laminated or the cover element can be positioned on the base (such as in the teaching in *Ackalusky*). Whether one removes the cover and what one does with the base after removal of the cover is seen to have been an obvious matter of choice or design; especially since the art taken as a whole teaches converting articles of one utility such as packages into articles of other utility such as entertainment or amusement devices. Note, too, it was well established to associate drip catching absorbent layers with tray type structures either by bonding or just a loose attachment as is done, for example, with meat trays, as shown e.g., by *Goodwin*, *Miller*, *Rhodes et al.* and *Hansen et al.*

(See Final Rejection, Pages 5-6 of Exhibit A of the Supplemental Appendix.)

F. CLAIMS 4-7, 9-12, 14-16, 19 AND 20 WOULD NOT HAVE BEEN OBVIOUS TO ONE HAVING ORDINARY SKILL IN THE ART AT THE TIME OF APPELLANT'S INVENTION OVER ACKALUSKY, TAYLOR, PERKINS, PAGNINI, BLANT, RIZZUTO, OSHIO, SUZUYA SHOKUHIN, SMITH, GOODWIN, MILLER, RHODES ET AL. AND HANSEN ET AL., FURTHER IN VIEW OF HUFFER ET AL., PENICK ET AL., FREEMAN ET AL., LIPPER, MORAVICK ET AL., SHIN, KNOERZER ET AL., GOTTSCHALK, GOLDSTEIN, WITKOWSKI ET AL., MCCLUNG ET AL. AND BELLET

With respect to the rejection of Claims 4-7, 9-12, 14-16, 19 and 20 under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*, *Goodwin*, *Miller*, *Rhodes et al.*, and *Hansen et al.* further in view of *Huffer et al.*, *Penick et al.*, *Freedman et al.*, *Lipper*, *Moravick et al.*, *Shin*, *Knoerzer et al.*, *Gottschalk*, *Goldstein*, *Witkowski et al.*, *McClung et al.* and *Bellet*, Appellant respectfully submits that Claims 4-7, 9-12, 14-16, 19 and 20 distinctly define the present invention from *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*,

Goodwin, Miller, Rhodes et al., Hansen et al., Huffer et al., Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. and Bellet for the reasons that follow.

Independent Claim 1 requires that the outer edge of the top layer is adjacent to the lip. Still further, independent Claim 1 requires a bottom layer that is made from a material that is rigid. Still further, independent Claim 1 requires a lip on the base that extends to a point above the top layer. Moreover, independent Claim 1 requires that the lip is perpendicular to the base. Dependent Claims 4-7 depend from independent Claim 1.

Independent Claim 8 requires a base that is made from a material that is rigid. Still further, independent Claim 8 requires a lip on the perimeter of the base that extends outward perpendicularly with respect to the top side of the base. Moreover, independent Claim 8 requires that the lip extends to a point above the absorbing means. Dependent Claims 9-12 depend from independent Claim 8.

Independent Claim 13 requires a base that is planar. Further, independent Claim 13 requires that the base is made from a material that is rigid. Still further, independent Claim 13 requires a lip on the perimeter of the base that is perpendicular to the base. Moreover, independent Claim 13 requires that the lip extends to a point above the first side of the cover. Dependent Claims 14-16,

19 and 20 depend from independent Claim 13.

Dependent Claims 4-7 require an adhesive sticker on the base; a washable tattoo on the base; a partition in the base wherein the partition is removed from the base; and a mark printed on the base, respectively. Further, dependent Claims 9-12 require a sticker attached to the absorbing means; a partition in the absorbing means wherein the partition is separable from the absorbing means; a plurality of perforations partitioning the absorbing means; and a washable tattoo removably attached to the absorbing means, respectively. Still further, dependent Claims 14-16, 19 and 20 further require the steps of perforating the cover to form a partition in the cover wherein the partition is a section of the cover that is separable from the cover; partitioning the base with a plurality of perforations; printing indicia on the base; removing the cover from the base to form a disk; and utilizing the base as a disk wherein the base is separated from the cover, respectively.

Nowhere do Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al., Hansen et al., Huffer et al., Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. or Bellet, taken singly or in combination, teach an apparatus, system, or method used when consuming a frozen treat, as required by independent Claims 1, 8 and 13. Huffer et al., Penick et al., Freedman et al., Lipper,

Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. and/or Bellet disclose either removable items or novelties for games, boxes of food, or the like. On the contrary, Appellant's invention requires an apparatus, system or method used for consuming a frozen treat.

One of ordinary skill in the art would never have been motivated to combine *Ackalusky* with *Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al., Hansen et al., Huffer et al., Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. or Bellet* in the manner suggested by the Patent Office in formulating the rejection of the claims under 35 U.S.C. §103(a). It is submitted that the question under §103(a) is whether the totality of the art would collectively suggest the claimed invention to one of ordinary skill in this art. *In re Simon*, 461 F.2d 1387, 174 USPQ 114 (CCPA 1972).

That elements, even distinguishing elements, are disclosed in the art is alone insufficient. It is common to find elements somewhere in the art. Moreover, most, if not all, elements perform their ordained and expected functions. The test is whether the invention as a whole, in light of the teachings of the references in their entireties, would have been obvious to one of ordinary skill in the art at the time the invention was made. *Connell v.*

Sears, Roebuck & Co., 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983).

It is insufficient that the art disclosed components of Appellant's apparatus and method. A teaching, suggestion, or incentive must exist to make the combination made by Applicant. *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1988).

Moreover, a motivation to combine does not exist merely because references are analogous art, as alleged by the Patent Office. The references must expressly or impliedly suggest the claimed invention, or the Patent Office must present a convincing line of reasoning as to why Appellant would have found the claimed invention to have been obvious in light of the teachings of the references. *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Inter. 1985).

With the analysis of the deficiencies of *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*, *Goodwin*, *Miller*, *Rhodes et al.*, *Hansen et al.*, *Huffer et al.*, *Penick et al.*, *Freedman et al.*, *Lipper*, *Moravick et al.*, *Shin*, *Knoerzer et al.*, *Gottschalk*, *Goldstein*, *Witkowski et al.*, *McClung et al.* and *Bellet* in mind, as enumerated above, no reason or suggestion in the evidence of record exists why one of ordinary skill in the art would have been led to combine *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*, *Goodwin*, *Miller*, *Rhodes et al.*, *Hansen et al.*, *Huffer et al.*,

Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. and Bellet to produce the claimed invention.

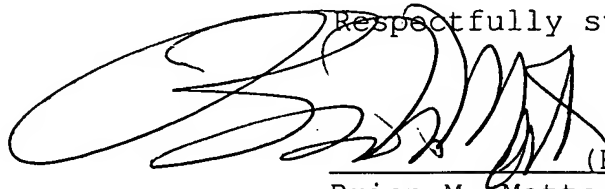
Further, Appellant submits that the Patent Office is merely "piece-mealing" references together, providing various teachings and positively defined limitations of Appellant's apparatus, system and method for collecting drips from a frozen treat. Of course, hindsight reconstruction of Appellant's invention is impermissible. Therefore, *prima facie* obviousness has not been established by the Patent Office as required under 35 U.S.C. §103(a).

In view of the foregoing, Appellant respectfully submits that dependent Claims 4-7, 9-12, 14-16, 19 and 20 distinctly define the present invention from *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith, Goodwin, Miller, Rhodes et al., Hansen et al., Huffer et al., Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al. and Bellet*, taken singly or in combination. Accordingly, the rejection of Claims 4-7, 9-12, 14-16, 19 and 20 under 35 U.S.C. §103(a), is improper and should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the rejection of Claims 1-20 is erroneous as a matter of law and fact and respectfully requests the Board to reverse the rejection.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'B. Mattson', is written over the signature line.

(Reg. No. 35,018)

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